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Supreme Court, U.S.
FILED
MAY 25 1995
CLERK

NO. 94-1805

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THE CITY OF NEW ORLEANS,
THE HUMAN RELATIONS COMMISSION,
and EARL D. JACKSON, SR., in his Official Capacity
as Executive Director of the Human Relations Commission,
Petitioners

v.

LOUISIANA DEBATING AND LITERARY
ASSOCIATION, THE STRATFORD CLUB,
THE BOSTON CLUB OF NEW ORLEANS
and THE PICKWICK CLUB
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Does the ordinance enacted by the City of New Orleans prohibiting discrimination in places of public accommodation establish unduly intrusive procedures governing (1) the City's investigation of complaints of discrimination lodged against a private social club, and (2) the City's determination of the validity of a social club's claim that it is private and thus exempt from application of the ordinance?

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JURISDICTION

This Court lacks jurisdiction as provided in Article III, Section 2, clause 1 of the United States Constitution because the Petition for Writ of Certiorari seeks an advisory opinion that can have no effect on the Pickwick Club. The United States Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court for the Eastern District of Louisiana, held that the Pickwick Club is a private club under the First Amendment

to the United States Constitution. The Petition for Writ of Certiorari does not challenge this holding. As a private club, the Pickwick Club is beyond the reach and scope of Chapter 40C of the Code of the City of New Orleans, which by its own terms applies only to places of public accommodation. Because the Pickwick Club is private, Chapter 40C of the Code of the City of New Orleans provides no jurisdiction or authority to the City of New Orleans to investigate complaints of discrimination lodged against the Pickwick Club. Hence any opinion this Court might render on the validity of the investigatory procedures established by Chapter 40C would serve merely to advise the City of New Orleans about future investigations of organizations other than the Pickwick Club.

CONSTITUTIONAL PROVISIONS, CONSTITUTIONAL AMENDMENTS, AND LOCAL ORDINANCES INVOLVED

United States Constitution, Article III, Section 2, clause 1

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State; --between Citizens of different States; and Citizens of another State; --between Citizens of different States; --between Citizens of the same State claiming Lands under

> Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Chapter 40(C) of the Code of the City of New Orleans (Petitioners' Appendix, item 3)

STATEMENT OF THE CASE

Except as herein noted, the Pickwick Club adopts as accurate the Statement of the Case presented in the Petition for Writ of Certiorari.

Petitioners' statement that Chapter 40C of the Code of the City of New Orleans "was modeled on a similar New York City ordinance", Petition, p. 2, is accurate as far as it goes. The two ordinances, however, differ significantly in certain aspects, as noted in the opinion of the Fifth Circuit. Petitioners' Appendix, pp. 33-34, n.29. Consequently, should this Court accept the instant Writ, the Pickwick Club reserves the right to delineate the distinctions between the two ordinances.

Further, Petitioners inaccurately state that "[s]hortly after the actions were filed, the City advised the district court that it would not refrain from proceeding with any investigation of the

Clubs during the pendency of the litigation, without the need for a restraining order." Petition, p. 5. In point of fact, the City advised the district court that it *would* refrain from proceeding with any investigation of the Clubs during the pendency of the litigation. Petitioners' Appendix, p. 9.

REASONS FOR DENYING THE WRIT

I. There Exists No Case or Controversy

The Petition for Writ of Certiorari filed by The City of New Orleans, The New Orleans Human Relations Commission, and Earl D. Jackson, Sr. in his Official Capacity as Executive Director of the New Orleans Human Relations Commission (hereinafter, collectively, "the City") does not request that this Court reverse and remand the judgment of the United States Fifth Circuit Court of Appeals in favor of the Pickwick Club. Rather, the City invites the Court to "review" the "result" of that judgment for the purpose of "clarifying" certain principles, arguing

> If this decision is allowed to stand without review, its effect will be to cripple the ability of municipal government to act on behalf of its citizens to investigate charges of discrimination by a private associations [sic], by cutting off its right to obtain information from such associations, and to permit public inquiry in order to determine its private status and the applicability of anti-discrimination laws. This decision leaves the City with no adequate means of assessing whether its ordinance is validly applicable to a particular entity.

Petition, p. 15. Despite the parade of horribles conjured up by the City, those horribles alone do not provide this Court with

jurisdiction. Because the City has not challenged holdings of the courts below that the Pickwick Club is a private club under the First Amendment to the United States Constitution, the City here seeks a mere advisory opinion that would address its future investigations of organizations other than the Pickwick Club.

The City's Petition for Writ of Certiorari, limited to the issue of the validity of the investigatory procedures established in Chapter 40C of the Code of the City of New Orleans (hereinafter "Chapter 40C"), does not present a case or controversy under Article III, Section 2, clause 1 of the United States Constitution because (1) both lower courts held that Chapter 40C's substantive provisions violate the Club's constitutional right of association and have barred, under permanent injunction, the application of the entirety of 40C to the Pickwick Club; (2) Chapter 40C, by its own terms, is not applicable to a constitutionally protected private association; and (3) the City does not possess a compelling governmental interest in the regulation of membership practices of a constitutionally protected private association. Because the City has failed to contest the primary holdings of the lower courts, this proceeding no longer constitutes a case or controversy under Article III of the United States Constitution; therefore, this Court should deny the City's Petition on the issue of the validity of the investigatory procedures set forth in Chapter 40C.

A. The City Has Not Contested the Holding of the Courts Below that the Substantive Provisions of Chapter 40C May Not Be Applied to the Pickwick Club

Each court below held that the Pickwick Club is a "private club" entitled to the fullest protection afforded by the First Amendment to the United States Constitution, relying on the precedents established by this Court in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481

U.S. 537 (1987); and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Petitioners' Appendix, pp. 24-34, 48-59. The Fifth Circuit held: "In light of the undisputed facts . . . we conclude, as did the district court, that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are 'most intimate'. Accordingly, they enjoy the fullest protection of their right of private association." [1] Petitioners' Appendix, pp. 33-34 (footnote omitted).

Further, a permanent injunction is still in force against the City barring the City from applying the substantive provisions of Chapter 40C to the Pickwick Club. In framing the issue before it, the district court wrote:

> [T]he court must make two separate inquiries. First, whether Plaintiffs are in fact private clubs under the Supreme Court jurisprudence - if not, the court need go no further. Second, whether the

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[1]The Fifth Circuit stated further:

> Discrimination can find no rest in a place of public accommodation. Whether it should be suffered to abide in private clubs is debatable among persons of good will. But, the Constitution trumps; those clubs have a right of private association under the First Amendment with which the government may not interfere impermissibly. Concomitantly, if those clubs must go public, in order to remain private, then their privacy rights ring hollow indeed; "the flame is not worth the candle".

Petitioners' Appendix, p. 40. This quotation makes it clear that the Fifth Circuit acknowledges that the First Amendment protects a private club, such as the Pickwick Club, from regulation of its membership practices.

> HRC's investigation into the complaint of discrimination against Plaintiffs constitutes unwarranted intrusion into (1) an individual's choice to enter into and maintain certain intimate or private relationships, or (2) the right of an individual not to have his private affairs made public by the government.

Petitioners' Appendix, pp. 47-48. Answering each of the above questions in the affirmative, the court held:

> Each Plaintiff Club has clearly demonstrated that it is a private club located at the most intimate end of the qualitative continuum of personal relationships. As such, *Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion and a right not to have their private affairs made public by the government.*
> * * *
> After reviewing the entire record, including arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way....

Petitioners' Appendix, pp. 70-71 (emphasis supplied). Thus, the district court understood that Chapter 40C was unconstitutional as to the Pickwick Club in at least two respects. First, Chapter 40C interferes impermissibly with the Club's right to maintain

intimate relationships because the statute's substantive provisions[2] attempt to regulate alleged discrimination by the Club in its membership practices. Second, the procedures employed by Chapter 40C to investigate allegations of discrimination interfere with the Club's associated right not to have its private affairs made public by the government.

The district court further issued a permanent injunction barring the City from applying Chapter 40C's substantive provisions and investigation provisions to the Pickwick Club:

> IT IS FURTHER ORDERED that Defendants, their officers, officials, agents, employees, and successors be and are hereby

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[2] Section 40C-102 of Chapter 40C contains the substantive provisions that make discriminatory practices unlawful in public accommodations, resorts, or amusements. It reads in part:

> (a) it shall be unlawful discriminatory practice and a misdemeanor for any public accommodation, resort, or amusement, as defined in Section 40C- 101 or for any person who is the owner, lessee, proprietor, manager, superintendent, employee, officer or agent thereof:
>
> (1) To discriminate against any person, either directly or indirectly, by refusing, withholding, or denying to such person any of the services, accommodations, advantages, facilities or privileges offered by the public accommodation, resort or amusement, by placing or attempting to place any person in a separate class of customers, patrons, members, guests or users or in a separate section or area of the premises or facilities of the public accommodation, resort or amusement because of race, color, creed, religion, national origin, ancestry, or unreasonably because of age, sex, sexual orientation, physical condition or disability.

> PERMANENTLY ENJOINED from *investigating any complaint of discrimination* against the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club pursuant to Chapter 40C of the Code of the City of New Orleans, *and from applying or attempting to apply Chapter 40C of the Code of the City of New Orleans in any way to the Louisiana Debating and Literary Association, the Stratford Club, the Boston Club of New Orleans, and the Pickwick Club.*

Petitioners' Appendix, pp. 70-71 (emphasis supplied). The district court understood that substantive provisions of Chapter 40C invade the Pickwick Club's right to maintain "intimate associations." It further understood that Chapter 40C's investigation procedures invade the Pickwick Club's right to not have its private affairs made public by the government. Consequently, the district court entered a permanent injunction barring the City from applying both the substantive and investigation provisions of Chapter 40C.

In sum, both lower courts held that the City is barred from applying Chapter 40C's substantive provisions to the Pickwick Club, yet the City here contests only that portion of the Fifth Circuit's opinion that addresses Chapter 40C's investigative procedures. The City has framed the issue presented for review by this Court as follows:

> Whether *the procedures* established by the City of New Orleans pursuant to an anti-discrimination ordinance, modeled upon that upheld in a previous decision of this Court, for *investigating complaints*

> *of discrimination and for determining the validity of claims of constitutional private club exemption* from application of the ordinance, are unduly intrusive of a private nonexpressive association.

Petition, p. i (emphasis supplied). The City, then, does not contest that the Pickwick Club is a private club protected by the First Amendment from the substantive application of Chapter 40C, nor does it contest the validity of the permanent injunction still in force that bars the City from applying the substance of Chapter 40C to the Pickwick Club. It is axiomatic that in order for Chapter 40C's investigation procedures to have any purpose at all, the Pickwick Club must be the type of association that is not insulated by the Constitution from the application of Chapter 40C's substantive provisions.[3] Consequently, the failure of the City to contest the holdings of the courts below that the Pickwick Club is a private club deserving of constitutional protection from Chapter 40C destroys the "case or controversy" element of this proceeding.

Supreme Court Rule 14.1(a) limits the scope of review on certiorari to the issues presented by the petitioner: "[o]nly the questions set forth in the petition, or fairly included therein, will

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[3] In effect, the City urges in this Court that it is entitled to investigate the alleged discriminatory practices of an organization under an anti-discrimination statute despite the undisturbed holdings of two lower federal courts that the substance of the anti-discrimination statute cannot be applied against that organization because the substance of the statute would violate that organization's First Amendment right of freedom of association.

be considered by the Court." S.Ct.R. 14.1(a).[4] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425, 426-27 (1993) (holding that an issue not raised in the "question presented" of the petition for certiorari would not be considered); *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 764-65 (1993) (stating that failure to raise an issue within questions on which petitioner sought review is alone enough to exclude the issue from review); *Yee v. City of Escondido*, 112 S.Ct. 1522, 1532-33 (1992) ("[w]hile the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein, we ordinarily do not consider

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[4] "Rule 14.1(a) serves two important and related purposes. First, it provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari, and enables the respondent to sharpen the arguments as to why certiorari should not be granted. Were we routinely to consider questions beyond those raised in the petition, the respondent would lack any opportunity in advance of litigation on the merits to argue that such questions are not worthy of review. Where, as is not unusual, the decision below involves issues on which the petitioner does not seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

Second, Rule 14.1(a) assists the Court in selecting the cases in which certiorari will be granted. Last term alone we received over 5,000 petitions for certiorari, but we have the capacity to decide only a small fraction of these cases on the merits. To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish...." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1532-33 (1992).

questions outside those presented in the petition for certiorari").

Petitioners have not contested and are barred now from contesting that the application of the substantive provisions of Chapter 40C to the Pickwick Club is violative of the Club's constitutional rights under the First Amendment. Furthermore, the City is barred from contesting the validity of the permanent injunction issued by the district court prohibiting the City "from applying or attempting to apply Chapter 40C . . . in any way to . . . the Pickwick Club." Petitioners' Appendix, p. 71. Because the only issue presented to this Court is whether the investigative procedures of Chapter 40C are overly intrusive, any issues concerning the application of the substance of Chapter 40C, to-wit the prevention of discrimination, to the Pickwick Club is barred.

The failure of the City to contest the full holdings of the lower courts or the validity of the permanent injunction barring application of the substance of Chapter 40C to the Pickwick Club divests this Court of jurisdiction because the proceeding no longer present a "case or controversy" under Article III of the United States Constitution. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case); *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (Article III of the Constitution limits federal courts to the adjudication of actual, on-going controversies between litigants). The City is barred by the holdings of the lower courts and by the extant permanent injunction from applying the substantive provisions of Chapter 40C to the Pickwick Club. *See* S.Ct.R. 14.1(a). Any ruling of this Court on the validity of the City's investigatory procedures would be of no efficacy vis-a-vis the Pickwick Club: the City no longer has the right or ability to investigate the Pickwick Club pursuant to Chapter 40C because

the substantive provisions of Chapter 40C may not be applied to the Pickwick Club.

"Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' . . . and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis v. Continental Bank Corporation*, 494 U.S. 472, 477 (1990) (citations omitted). It is irrelevant that there may have been a case or controversy in the district court or court of appeal,[5] because a case or controversy must exist at all stages of the proceedings. *Lewis*, 494 U.S. at 477; *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). Ultimately, the City's request for review of Chapter 40C's investigatory procedures is a request for no more than an "advisory opinion" because even if this Court held that the Chapter 40C's procedures for investigating complaints or for investigating the private club status of the Pickwick Club were not overly intrusive and did not violate the First Amendment right of association of the Club, the City is yet barred from applying the substantive provisions of Chapter 40C to the Pickwick Club.

B. Chapter 40C Itself Bars Future Investigation of the Pickwick Club

Under its own terms, Chapter 40C is not applicable to

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[5] The Pickwick Club does not argue that a case or controversy never existed in this action, but, rather, the Club maintains that the failure of the City to contest dispositive holdings and orders of the trial and appellate courts destroys the case or controversy elements of this litigation.

constitutionally protected private associations. Section 40C-103(b)(2), Petitioners' Appendix, p. 102. Consequently, the failure of the City to contest the holdings of the lower courts that the Pickwick Club is a constitutionally protected private association renders moot the Petition for a Writ of Certiorari sought by the City on the issue of the intrusiveness of Chapter 40C's investigation procedures. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) (holding that decision by a party to abandon its claim to equitable relief renders the question on which certiorari was requested moot).

Section 40C-103 provides an exception to the application of Chapter 40C for "distinctly private entities," protecting such entities from the application of Section 40C- 102, which contains the substantive provisions of the Chapter. Petitioners' Appendix, p. 102. Section 40C-103 provides in pertinent part:

> A club or institution is distinctly private in character if either:
>
> (2) its character as an institution, club, or association is such that, under the constitutional doctrines of freedom of association (including expressive association) and privacy prevailing in the law at the time of the hearing, the Constitution of this state or of the United States requires that Section 40C-102 not be applied against it.

Section 40C-103(b)(2), Petitioners' Appendix, pp. 102, 104. Hence a club that is protected by the freedom of association established by the First Amendment is beyond the scope of Chapter 40C.

As discussed above, both courts below held that the Pickwick Club is a private association entitled to the fullest

protection afforded by the First Amendment. The district court held that "Plaintiffs have a First Amendment right to enter into and maintain certain intimate human relationships without undue state intrusion...." Petitioners' Appendix, p. 70. The court further found injunctive relief appropriate to protect the Club from application of Chapter 40C: "After reviewing the entire record, including arguments of counsel, the court finds that Defendant should be permanently enjoined from investigating any complaints of discrimination against Plaintiffs pursuant to Chapter 40C and from applying or attempting to apply Chapter 40C to plaintiffs in any way...." Petitioners' Appendix, p. 70. The Fifth Circuit also held that the Pickwick Club is entitled to constitutional protection from the mandates of Chapter 40C. Petitioners' Appendix, pp. 33-34, 40. Furthermore, the Fifth Circuit affirmed the rulings of the district court, including the permanent injunction barring the City from applying Chapter 40C to the Pickwick Club "in any way." Petitioners' Appendix, p. 41.

The City's Petition to this Court has not contested these holdings or orders of the lower courts and, therefore, any issues relating to those holdings and orders are not before this Court. *See* S.Ct.R. 14.1(a). Under the holdings of the lower courts, uncontested here, the Constitution of the United States requires that Section 40C-102 not be applied to the Pickwick Club. Section 40C-103(b)(2), Petitioners' Appendix, pp. 102-104. Whether Chapter 40C's investigative procedures are overly intrusive is now a moot question because Chapter 40C does not apply to the Pickwick Club under the ordinance's own terms. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). "It has long been settled that a federal court has no authority 'to give opinions on moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology of California v. United States*,

113 S.Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

"Redressability" is a necessary component of the "case or controversy" requirement and is unsatisfied by the City's Petition. *See Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297, 2302 (1993); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "To invoke the constitutional power of the federal courts to adjudicate a case or controversy under Article III, [petitioners] here must allege and prove an injury 'fairly traceable to the to the [respondents'] allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Franklin v. Massachusetts*, 112 S.Ct. 2767, 2776 (1992). Here the City has not satisfied the redressability component of Article III jurisdiction because any ruling concerning the intrusiveness of the City's investigative procedures would leave undisturbed the holdings below that the Pickwick Club is constitutionally protected from the application of Chapter 40C and, therefore, that the Club is, by Chapter 40C's own definition, outside its reach.

C. Chapter 40C Does Not Provide to The City Any Legitimate Interest in Regulating Private Social Clubs

Even if the Pickwick Club were covered under the ambit of Chapter 40C, the determination by the Fifth Circuit and the district court, uncontested in this Court, that the Pickwick Club is a "private club" for First Amendment association purposes bars the City from regulating discrimination at the Pickwick Club. Having refused to contest the holding of the Fifth Circuit that the Pickwick Club is a constitutionally protected private association deserving of the fullest protection of its right of private association, the City now asserts only that the procedures established by Chapter 40C for investigating the Pickwick Club are not overly intrusive of the Club's First Amendment rights. The City, however, has no legitimate governmental interest in

regulating discrimination or in investigating allegations of discrimination at a purely private social club. This lack of legitimate interest is particularly striking in terms of the Pickwick Club, whose "personal attachments places [it] near those that are 'most intimate.' " Petitioners' Appendix, pp. 33-34.

The City's interest in eradicating discrimination is limited to places of public accommodation and does not extend to purely private social clubs. Section 40C-50 sets forth the policy underpinning Chapter 40C:

> In the City of New Orleans with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, religion, age, physical condition, national origin and ancestry, many of them with disabilities, there is no greater danger to the health, morals, safety and welfare of the city and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, sex, creed, religion, age, national origin or ancestry, or physical condition or disability or sexual orientation. The Council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state. The New Orleans Human Relations Commission as created by Article I of this chapter is designated as an instrument of the city's power to eliminate and prevent discrimination in employment, in places of accommodation, resort or amusement, in housing accommodations and

> in commercial space because of race, creed, religion, color, sex, age, sexual orientation, national origin, ancestry, or physical condition or disability whenever such discrimination is prohibited by provisions of this chapter or other city law.

Petitioners' Appendix, pp. 82--83. The policy of Section 40C does not include, nor could it, the prevention of discrimination in places of purely private or intimate association. Indeed, the City itself acknowledges that Chapter 40C was adopted "to eliminate and prevent discrimination in . . . places of public accommodation . . ." Petition, p. 2.

A government's interest in regulating the freedom of persons to enter into intimate associations depends on where that association falls on the spectrum of personal relationships, from the most intimate to the most attenuated. *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1983). In the case *sub judice*, the district court held:

> Because Plaintiff Clubs easily met every factor in determining private club status and because they have very selective membership policies designed to ensure comradery and close personal acquaintances, this court finds that Plaintiff Clubs are entitled to the fullest protection of the First Amendment's right to privacy an freedom of intimate association.

Petitioners' Appendix, pp. 59-60. The Fifth Circuit also found that the Pickwick Club is among those associations that are most intimate: "we conclude, as did the district court, that the Clubs

constitute organizations whose location on the spectrum of personal attachments places them near those that are "'most intimate'". Petitioners' Appendix, p. 33.

In its Petition, the City acknowledges these findings:

> The analysis undertaken by the Fifth Circuit in this opinion involved extensive assessment of such information, including the Clubs' history, purposes, activities, membership criteria, admission processes, internal rules and by-laws, structural organization and number of members, leading to the conclusion that they were sufficiently "private" in nature to be entitled to "full constitutional protection" of their First Amendment rights of private association.

Petition, p. 8. Yet the City did not seek review of these holdings of the lower courts, to-wit, that the Pickwick Club is a private club of constitutionally protected intimate association. The City only seeks review of the investigation procedures provided by Chapter 40C. *See* "Question Presented," Petition, p. i. The City is now barred from arguing that the Pickwick Club is not an "intimate" association protected by the constitution. S.Ct.R. 14.1(a). Under these circumstances, the City simply has no authority, pursuant to Chapter 40C, to apply the investigatory provisions of Chapter 40C to the Pickwick Club.

II. The Fifth Circuit Opinion Is Correct

The City mistakenly advises this Court that "[T]he courts below struck down the City's anti-discrimination ordinance as unconstitutional . . ." Petition, p. 7. This assertion is inaccurate: Chapter 40C of the Code of the City of New Orleans stands unmolested. At all times during the proceedings below, the

Pickwick Club was careful to underscore that the instant suit was an "as-applied" challenge. Neither the Pickwick Club nor the other plaintiffs below argued that Chapter 40C is inherently unconstitutional or that any conceivable application of Chapter 40C to any conceivable organization would violate the First Amendment. Rather, the clubs merely alleged that Chapter 40C is unconstitutional as applied to them. Both courts below expressly rejected the City's argument that this case presented a facial challenge to Chapter 40C. Petitioners' Appendix, pp. 22 ("[W]e are faced with an as-applied challenge."), 47 ("At the outset, the court finds that Plaintiffs are challenging the Ordinance on constitutional grounds only as the Ordinance applies to them ... Accordingly, this court will analyze Plaintiffs' constitutional claims as an 'as-applied' challenge to the Ordinance.").

Because the suit below involved as-applied challenges to Chapter 40C, the judgments of the lower courts have a narrow application, *i.e.*, they affect only the four plaintiff social clubs. The City's Petition, however, requests that this Court issue a broad pronouncement addressing whether the procedures of Section 40C "for investigating complaints of discrimination" and "for determining the validity of claims of private club exemption" are unduly intrusive of the rights of a private nonexpressive association. Petition, p. i. Such a pronouncement, however, would be inappropriate in the context of this case, where the courts below engaged in extensive fact-finding about the precise characteristics of the individual plaintiff social clubs. Petitioners' Appendix, pp. 28-34, 48-59.

The Fifth Circuit's holding that the City failed to meet its burden of demonstrating how the means it has selected to enforce Chapter 40C are the least intrusive on the Club's and its members' right of private association addressed only three arguments raised by the City in its brief to the Fifth Circuit: (1) that Chapter 40C would not require highly public proceedings; (2) that the

City could not demand membership lists from the Clubs; and, (3) that liberal discovery in the federal court proceeding to which the Clubs subjected themselves equates with the powers the City possesses under Chapter 40C. Petitioners' Appendix, p. 35. Notably, the City's Petition does not contest the validity of the Fifth Circuit's express findings that (1) any investigation of the Clubs under Chapter 40C would require highly public proceedings; (2) Chapter 40C empowers the City to demand the production of membership lists from the Clubs and, in addition, to demand the production of club members' tax returns; and (3) proceedings undertaken pursuant to Chapter 40C are not governed by rules of evidence and civil procedure and are presided over by a hearing officer appointed by the Executive Director of the New Orleans Human Relations Commissioner. Petitioners' Appendix, pp. 36-40. Rather, the City here maintains that it is entitled to hold highly public hearings wherein the Pickwick Club's membership lists will be exposed and in which the hearing officer is entitled to examine, among other documents, the Club members' tax returns.

Indeed, the crux of the City's argument is that the palpable risk of public exposure of information about the Pickwick Club's private affairs does not substantially impair the Club's constitutional right of private association. Petition, pp. 9, 13. As noted above, however, the City has not contested the holdings of the courts below that the Pickwick Club is "entitled to the fullest protection of the first Amendment's right to privacy and freedom of intimate association." Petitioners' Appendix, p. 60. *Accord*, Petitioners' Appendix, pp. 33-34. The City's attempt to distinguish between "the right of a private social club to protection against public disclosure about its affairs" from "the right of private social association itself," Petition p. 14, is mere wordplay. As the District Court observed:

> Because of the[] intimate, family-like relationships among members, it is likely that members carry on activities at the Clubs in much the same way that they do at their homes. If the government can force Plaintiff members to publicly reveal these types of activities, then the First Amendment would have no utility. Clearly, the First Amendment provides individuals with definite and important rights, and exposing these private club members to revelation about these types of activities, along with members' tax returns and membership lists, violate the rights of these individuals not to have their private affairs made public by the government.

Petitioners' Appendix, p. 63 (citing *Whalen v. Roe*, 429 U.S. 580, 599 n.24 (1976)). The City's argument ignores that, by its very nature, privacy once destroyed may never be restored. Ultimately, the City's reasoning renders the First Amendment devoid of meaning.

Finally, the Fifth Circuit's opinion is consistent with prevailing jurisprudence addressing the right to privacy afforded by the First Amendment. This Court has identified a constitutionally protected "zone of privacy" that involves two kinds of interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 580, 599-600 (1976). As to the latter interest, "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 544 (1987). The First Amendment protects those relationships that presuppose

"deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thought, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1983). This is so because the "freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Rotary Club*, 481 U.S. at 545.

The second interest protected by a club's constitutional "zone of privacy" is the interest in avoiding disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 580, 599-600 (1976). This Court recognizes that one primary attribute of the constitutional right of privacy is "the right of an individual not to have his private affairs made public by the government." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Indeed, "'the right to be let alone'" is "'the right most valued by civilized men.'" *Whalen*, 429 U.S. at 599 n.25 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

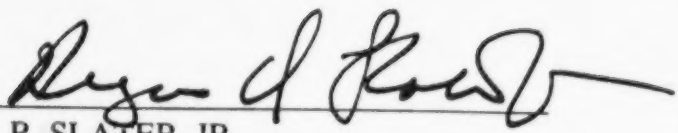
First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government influence." *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963). Chapter 40C contemplates a public inquiry into confidential and sensitive matters, which would certainly infringe upon the Pickwick Club's privacy rights as protected by the First Amendment. The "[i]nviolability of privacy in group association may in many circumstances be indispensable to the preservation of freedom of association . . ." *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960). *See N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1958) (disclosure of membership lists entails "the likelihood of a substantial restraint upon the exercise by [an organization's] members of their right to freedom of association.").

The First Amendment does not contain mere hollow words without meaning or effect. And the effect of the First Amendment in the instant case is to afford the Pickwick Club protection from the City's undue interference with its right of private association. In light of Chapter 40C's provision for highly public hearings requiring the revelation of sensitive private information such as the Pickwick Club's membership lists and the Club members' tax returns, the Fifth Circuit correctly held that the City's proposed investigation of the Pickwick Club, as well as other proceedings contemplated by Chapter 40C, threatens unduly the Club's right of private association. Petitioners' Appendix, p. 34.

CONCLUSION

Petitioners ask this Court to clarify "the balancing principles articulated by this Court in [] private/government interest conflicts." Petition, p. 16. Any such clarification undertaken by this Court, however, can have no effect on the Pickwick Club. The City remains permanently enjoined from applying the substance of Chapter 40C to the Club. Any ruling by this Court on the validity of investigatory provisions of Chapter 40C would constitute an advisory opinion because the City cannot investigate complaints of discrimination lodged against the Pickwick Club. As a constitutionally protected private club under the First Amendment, the Pickwick Club, under the terms of Chapter 40C itself, falls outside the scope of the ordinance. In sum, there exists between the parties no real or substantial controversy sufficient to provide this Court with jurisdiction under Article III, section 2, clause 1 of the United States Constitution.

Respectfully submitted:

BY: 

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